Filed 3/8/10 In re A.N. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.N. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. T.N. et al., Defendants and Appellants.	G042650 (Super. Ct. Nos. DP011966, DP014303) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis J. Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant H.N.

Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Appellant T.N.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

T. N., mother, and H. N., father, appeal the order denying their Welfare and Institutions Code section 388 petition (all statutory references are to the Welfare and Institutions Code) and the judgment terminating their parental rights under section 366.26 to Angel, born 2005, and Aaron, born 2006. They contend the court abused its discretion in denying the petition because they presented substantial evidence of changed circumstances and a modified order would be in the children's best interest. They also maintain that the court erred in finding that the benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) was not supported by substantial evidence. We disagree with their contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Parents have a long history with the dependency court. Mother previously lost her parental rights to four other children, not the subject of this action. Father was the father of the youngest of these four and he had likewise lost his parental rights to this son. Both parents also have lengthy records of substance abuse and criminal convictions.

The court declared Angel to be a dependent and ordered family reunification services in July 2005. Aaron, born October 2006, was released to his parents but in December 2006 the court declared him a dependent but initially left him in the custody of his parents under a plan of family maintenance. Also in December 2006, Angel was placed with her parents, initially for a 60-day trial period. Orange County Social Services Agency (SSA) reported in February 2007 that both parents were taking drug tests, receiving counseling services, and complying with the court-ordered plan, although father commenced a 60-day jail sentence that month. In reports filed in August and November, SSA recommended the children remain in parents' custody and the court so ordered.

But in July 2008, the children were taken into protective custody because parents were no longer complying with the court's drug testing requirement, and father had tested positive for cocaine in May. Also, during an unannounced home visit, the home was dirty, as were the children, and the SSA representative found beer. SSA reported that, in spite of the services, parents continued their substance abuse. The court ordered the children detained.

At the time of the review hearing conducted in September 2008, the children were in foster care. The SSA report stated that mother had failed to show up for her drug treatment program. Although father had attended his intake, he missed all other appointments. Father had also stopped visiting the children. The court scheduled a hearing under section 366.26. Before the hearing, parents told the SSA representative that they were attending alcohol and drug treatment programs and mother stated she meets weekly with a counselor.

From October 2008 through July 2009, parents tested regularly and participated in treatment programs. But in February 2009, a police check found the parents in the home of a methamphetamine using probationer. Between April and July 2009, the parents resumed regular visitation with the children; the children were happy to be with them and appeared to be bonded to their parents

Further facts are contained in the discussion where appropriate.

DISCUSSION

After hearing testimony and additional evidence, the court denied the parent's section 388 petitions. As mother notes in her brief, "section 388 really is an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528, italics omitted.)

"A parent may regain custody after reunification services have been terminated only by showing that changed circumstances demonstrate a return to parental custody is in the child's best interests. [Citations.]" (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.)

Parents had four years to straighten out their lives so as to regain custody of their two youngest children. And they did try. After many years of substance abuse and the loss of parental rights to four of mother's and one of father's children, there was a period when they were able to care for two children. From October 2006 until some time in 2008, they apparently maintained sobriety. But then they failed again. And it was not until the court scheduled a section 366.26 hearing that they once again resumed their efforts to stay sober. Under these circumstances, we cannot say that the court abused its discretion in denying their petition under section 388.

Under section 388, the burden is on the parents to show that it is in their children's best interest they be returned. As mother also notes, in determining the children's best interest, the court must consider "(1) [t]he seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532, italics omitted.)

The reasons supporting the court's decision are found primarily in the first and third of these factors. We know that the parents can live soberly for a period; they have done so at least twice during the course of these proceedings. But we also know, based on this experience, they are likely to relapse. These children, now three and four years old, lived with their parents for approximately a year and a half. They appear to be bonded to their parents. But there is little assurance that, if returned to their custody, the problems may not again recur, thus likely creating further uncertainty in these children's lives. The court's expressed concern whether parents would remain sober if their

children were returned to them is well supported by the evidence. To quote our late colleague, Justice Henry Moore, in *In re Rikki D.* (1991) 227 Cal.App.3d 1624, disapproved on another ground in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12, "Children should not be required to wait until their parents grow up." (*In re Rikki D., supra,* 227 Cal.App.3d at p. 1632.)

The trial court was particularly troubled by the fact that mother did not consider her 2006 arrest for driving under the influence and father did not consider his positive test for cocaine use as "relapse[s]." The court also noted that the parents' circumstances were, at best, "changing," rather than "changed" and pointed to mother's lack of insight and father's lack of candor.

Mother relies on her statement that she has not used drugs since 2004 and dismisses her missed drug tests by stating she "never affirmatively tested positive for drugs or alcohol throughout this case." But her many missed drug tests speak for themselves and under the plan, "[a] missed test is . . . considered a positive test." They are evidence contradicting mother's claims of continued sobriety. We admire both parents' efforts to remain sober and hope they continue in these efforts. But this does not mean that their children's status should remain suspended while they find out whether this hope will be realized.

This same evidence supports the decision to terminate the parents' rights under section 366.26. There undoubtedly would be some benefit to the children were they restored to their parents' custody. But these benefits, which the court carefully considered under section 366.26, subdivision (c)(1)(B)(i), are outweighed by the continuing probability that the parents would relapse. Particularly in light of the children's age, the time has come for them to be placed in a family where their lives will have the stability that comes from knowing their situation will not continue to be subject to periodic changes.

The children were happy and healthy in the care of their foster mother. They were attached to her. Although the visitation monitor expressed the opinion that the children seemed bonded to their parents, the relationship did not differ from that between the children and their foster parents. Under the test of *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, we cannot say that the benefit exception of section 366.26, subdivision (c)(1)(B)(i) should be applied.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.